Supreme Court, U.S.
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No. _____

In the

# Supreme Court of the United States

October Term, 1999

Joseph Charles Pelchat,

*Petitioner,*

v.

United States of America,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether, for a person sentenced prior to the enactment of 18 U.S.C. §3583(h) and upon revocation of a term of supervised release, an additional period of incarceration may be followed by a subsequent term of supervised release.

## PARTIES TO THE PROCEEDING

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## CITATIONS OF OPINIONS

The opinion of the United States Court of Appeals for the Eighth Circuit filed on March 12, 1999, was unpublished.

## BASIS FOR JURISDICTION IN SUPREME COURT

On March 12, 1999, the United States Court of Appeals for the Eighth Circuit affirmed the decision of the United States District Court for the District of Minnesota in the matter of United States v. Joseph Charles Pelchat. In the same judgment, the Petitioner's motion for hearing *en banc* was denied. Due to the concurrent denial, no motions for rehearing were filed.

Jurisdiction is conferred on this Court by 28 U.S.C.A. §1254(1), which allows a court of appeals case to be reviewed by the Supreme Court by writ of certiorari granted upon the petition of any party to any criminal case before or after rendition of judgment or decree.

## CONSTITUTIONAL AND STATUTORY PROVISIONS

18 U.S.C. §3583(e):

> "Modification of conditions or revocation.-- The court may . . .
> (1) terminate a term of supervised release and discharge the defendant . . .
> (2) extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, . . .
> (3) revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of

supervised release authorized by statute for the offense that resulted in such term of supervised release . . ., or

(4) order the defendant to remain at his place of residence during nonworking hours . . ."

Art. I, §10(1) of the United States Constitution:

"No State shall. . . pass any . . . ex post facto law . . ."

Art. I, §9(3) of the United States Constitution:

"No . . . ex post fact Law shall be passed."

Amendment V to the United States Constitution:

"No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."

## STATEMENT OF THE CASE

Federal jurisdiction existed in the District Court for the District of Minnesota, because the Petitioner had been charged with and convicted of Possession with Intent to Distribute Marijuana, in violation of federal law. Jurisdiction of the Court of Appeals for the Eighth Circuit was based on 28 U.S.C. §1291, which provides for jurisdiction over a final judgment from a U.S. District Court. This Court, therefore, has jurisdiction through 28 U.S.C. §1254, which allows cases in the courts of appeals to be reviewed by the Supreme Court by writ of certiorari.

In the district court, the Petitioner's supervised release was revoked and he was sentenced to 14 months imprisonment, to be followed by 22 months of supervised release. Because the Petitioner was originally sentenced prior to the enactment of 18 U.S.C. §3583(h), he appealed to the Eighth Circuit requesting relief from the additional term of supervised release which, although specifically authorized in 18 U.S.C. §3583(h), was not authorized by the controlling statute at the time of his original sentence, 18 U.S.C. §3583(e). In affirming the district court decision, the Eighth Circuit relied on its previous decision in United States v. Schrader, 973 F.2d 623 (8th Cir. 1992).

The Schrader decision interprets the language of 18 U.S.C. §3583(e) to allow imposition of an additional term of supervised release. Every court of appeal, except the First Circuit, has decided the identical issue to the contrary, holding specifically that the wording of 18 U.S.C. §3583(e) prohibits such an interpretation. Some of these decisions have held that they would like to be able to apply the law the way the Eighth Circuit does but are constrained from doing so by the rules of statutory construction.

Representative cases of those circuits which have decided the issue contrary to the Eighth Circuit include: United States v.

Koehler, 973 F.2d 132 (2nd Cir. 1992); Fowler v. US Parole Com'n, 94 F.3d 835 (3rd Cir. 1996); United States v. Cooper, 962 F.2d 339 (4th Cir.1992); United States v. Holmes, 954 F.2d 270 (5th Cir. 1992); United States v. Truss, 4 F.3d 437 (6th Cir. 1993); United States v. McGee, 981 F.2d 271 (7th Cir. 1992); United States v. Behnezhad, 907 F.2d 896 (9th Cir.1990); United States v. Rockwell, 984 F.2d 1112 (10th Cir. 1993); United States v. Williams, 2 F.3d 363 (11th Cir.1993).

Additionally, the Third, Fourth, Ninth, and Seventh circuits have held that an imposition of supervised release under 18 U.S.C. §2583(e) violates the ex post facto and/or due process clauses of the United States Constitution. United States v. Dozier, 119 F.3d 239 (3rd Cir. 1997); United States v. Lominac, 144 F.3d 308 (4th Cir.1998); United States v. Beals, 87 F.3d 854 (7th Cir.1996); United States v. Collins, 118 F.3d 1394 (9th Cir.1997).

In addition to the Eighth Circuit's failure to recognize that every circuit which has addressed the issue has decided opposite to itself, except for the First Circuit, the court refused to put the question to an *en banc* panel to determine whether the holding in Schrader was incorrect. The Eighth Circuit's current unwillingness to either conform to the majority of circuits or even re-evaluate its earlier decision is demonstrated by the fact that such a complicated issue warranted in this case only a three paragraph decision from the court.

Because the issue involves interpretation of a federal statute and the denial of constitutional protections, and because those under the jurisdiction of the Eighth and First circuits are currently receiving disparate treatment as compared to the rest of the country, this issue should be addressed by the Supreme Court for a final and authoritative decision on the issue.

## REASONS FOR ALLOWANCE OF WRIT

This writ should be allowed because a multitude of United States courts of appeal have entered decisions in conflict with the decision of the Eighth Circuit on the same important federal question. The issue upon which the Eighth Circuit fails to agree with the majority of circuits deals with interpretation of a federal statute, which results in disparate treatment of those under the jurisdiction of the Eighth and First Circuits.

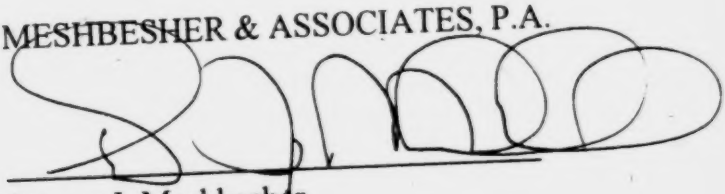
Specifically, the Eighth and First Circuit decisions regarding the effect of 18 U.S.C. §3583(e) are opposite to the decisions of every other circuit court which has decided the issue.

## CONCLUSION

Review by the U.S. Supreme Court is necessary because of the differing opinions between the Eighth and First Circuits and all the other federal circuit courts of appeal. Therefore, the Petitioner requests that a Petition for Certiorari be granted to review this important federal question.

Respectfully submitted,

MESHBESHER & ASSOCIATES, P.A.



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**APPENDIX**

**United States Court of Appeals**
**FOR THE EIGHTH CIRCUIT**

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No. 98-3723

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| | | |
|---|---|---|
| Joseph Charles Pelchat, | * | |
| | * | |
| Appellant, | * | |
| | * | Appeal from the United States |
| v. | * | District Court for the |
| | * | District of Minnesota. |
| United States of America, | * | |
| | * | [UNPUBLISHED] |
| Appellee. | * | |

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Submitted: March 9, 1999
Filed: March 12, 1999

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Before RICHARD S. ARNOLD, WOLLMAN, and BEAM, Circuit Judges.

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PER CURIAM.

In October 1998, while Joseph Charles Pelchat was serving

a four-year supervised release term, the district court[1] determined that he had violated his release conditions, revoked his release, and sentenced him to 14 months imprisonment and 22 additional months of supervised release. Pelchat appeals, arguing the district court erred in imposing additional supervised release after revocation and imposition of a prison term. We affirm.

Pelchat first mounts an attack on our decision in United States v. Schrader, 973 F.2d 623, 625 (8th Cir. 1992) (under 18 U.S.C. § 3583(e)(3), district court may impose revocation sentence consisting of both imprisonment and supervised release). Not only have we repeatedly declined to reconsider Schrader en banc, see, e.g., United States v. Hartman, 57 F.3d 670, 671 (8th Cir. 1995) (per curiam), but we specifically denied Pelchat's motion for en banc consideration of this appeal.

Pelchat next raises constitutional challenges to his revocation sentence. He argues that he could not have foreseen, at the time he was originally sentenced, that his conduct while on supervised release could subject him to both imprisonment and further supervised release, in violation of his due process rights. He also contends that applying 18 U.S.C. § 3583(h) (specifically authorizing imprisonment and supervised release upon revocation) to him violates the Ex Post Facto Clause, as subsection (h) was not in existence when he was originally sentenced. However, we have previously considered and rejected such arguments. See United States v. St. John, 92 F.3d 761, 763-67 (8th Cir. 1996).

Accordingly, we affirm.

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[1] The Honorable Paul A. Magnuson, Chief Judge, United States District Court for the District of Minnesota.

A true copy.

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Supreme Court, U.S.
FILED
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No. 98-1996

# In the Supreme Court of the United States

JOSEPH CHARLES PELCHAT, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## BRIEF FOR THE UNITED STATES

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## QUESTION PRESENTED

Whether 18 U.S.C. 3583(e) (1988), which governed supervised release at the time of petitioner's offense (but has since been amended), authorized the district court, upon revoking petitioner's supervised release, to order petitioner to serve a renewed term of supervised release following a term of reimprisonment.

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# In the Supreme Court of the United States

No. 98-1996

JOSEPH CHARLES PELCHAT, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## BRIEF FOR THE UNITED STATES

### OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is unpublished, but the decision is noted at 175 F.3d 1025 (Table).

### JURISDICTION

The judgment of the court of appeals was entered on March 12, 1999. The petition for a writ of certiorari was filed on June 10, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

After his supervised release was revoked by the United States District Court for the District of Minnesota, petitioner was ordered to serve 14 months' reimprisonment, to be followed by 22 months' renewed

supervised release. The court of appeals affirmed. Pet. App. A1-A2.

1. On May 14, 1990, after a guilty plea, petitioner was convicted of possessing marijuana with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1), which was a Class C felony.[1] Gov't C.A. Br. 1. Petitioner was sentenced to 84 months' imprisonment, to be followed by four years' supervised release. *Ibid.* On October 9, 1998, while petitioner was serving his term of supervised release, the district court determined that he had violated his release conditions, revoked his release, and sentenced him to 14 months' reimprisonment, to be followed by a 22-month term of renewed supervised release. *Id.* at 2; Pet. App. A2.

2. At the time of petitioner's original offense, violations of supervised release were governed by 18 U.S.C. 3583(e) (1988). That provision authorized the district courts, upon an offender's violation of his supervised release, to "revoke a term of supervised release, and require the person to serve in prison all or part of the term of supervised release without credit for time previously served on postrelease supervision." 18 U.S.C. 3583(e)(3) (1988). For a Class C felony, such as petitioner's offense, the reimprisonment component of the post-revocation sentence was limited to two years. 18 U.S.C. 3583(e)(3) (1988). The courts of

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[1] Petitioner pleaded guilty to possessing with the intent to distribute 1.259 kilograms of marijuana, an amount that invokes the sentencing provisions of 21 U.S.C. 841(b)(1)(D). See Plea Agmt. ¶ 1 (May 14, 1990). Because petitioner committed his offense after a previous conviction for a drug offense (*id.* ¶ 8), his offense was punishable by up to ten years' imprisonment, to be followed by a minimum of four years' supervised release. See 21 U.S.C. 841(b)(1)(D). Petitioner's offense was therefore a Class C felony under 18 U.S.C. 3559(a)(3).

appeals reached conflicting views on whether that provision authorized a district court to order an offender who violated supervised release to serve a combined term of reimprisonment and renewed supervised release, or whether the court was limited to electing between a term of reimprisonment or a term of renewed supervised release.[2] The Eighth Circuit, in which petitioner was sentenced, held that a district court was authorized to combine a term of reimprisonment with a renewed term of supervised release. See *United States* v. *Schrader*, 973 F.2d 623, 625 (8th Cir. 1992).

Effective September 13, 1994—after petitioner committed the underlying offense for which he was imprisoned, but before he violated the terms of his supervised release—Congress enacted 18 U.S.C. 3583(h). Pub. L. No. 103-322, Tit. XI, § 110505(3), 108 Stat. 2017. Section 3583(h) made clear that, when a defendant's term of supervised release is revoked and

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[2] The First and Eighth Circuits had ruled that sentencing courts had the power to order offenders to serve terms of reimprisonment to be followed by renewed supervised release, but other circuits disagreed and found no authority to order offenders to serve a renewed term of supervised release if they were sentenced to reimprisonment. Compare *United States* v. *O'Neil*, 11 F.3d 292, 293 (1st Cir. 1993), and *United States* v. *Schrader*, 973 F.2d 623, 625 (8th Cir. 1992), with *United States* v. *Koehler*, 973 F.2d 132, 134-136 (2d Cir. 1992); *United States* v. *Malesic*, 18 F.3d 205, 206 (3d Cir. 1994); *United States* v. *Cooper*, 962 F.2d 339, 341-342 (4th Cir. 1992); *United States* v. *Holmes*, 954 F.2d 270, 272-273 (5th Cir. 1992); *United States* v. *Truss*, 4 F.3d 437, 441 (6th Cir. 1993); *United States* v. *McGee*, 981 F.2d 271, 274-276 (7th Cir. 1992); *United States* v. *Behnezhad*, 907 F.2d 896, 898-899 (9th Cir. 1990); *United States* v. *Rockwell*, 984 F.2d 1112, 1116-1117 (10th Cir.), cert. denied, 508 U.S. 966 (1993); and *United States* v. *Tatum*, 998 F.2d 893, 895-896 (11th Cir. 1993).

he is ordered to serve a term of reimprisonment, the district court may also order the offender to serve a term of supervised release after his release from reimprisonment. Section 3583(h) expressly authorizes a new term of supervised release, as long as the term of reimprisonment is less than the maximum authorized upon revocation, and as long as the combination of the period of reimprisonment and the period of supervised release does not exceed in duration the maximum term of supervised release authorized for the original offense. 18 U.S.C. 3583(h). For these purposes, the offender is not entitled to any credit for the time he spent on supervised release before it was revoked. See 18 U.S.C. 3583(e)(3) and (h).[3]

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[3] Section 3583(h) provides in full:

> When a term of supervised release is revoked and the defendant is required to serve a term of imprisonment that is less than the maximum term of imprisonment authorized under subsection (e)(3), the court may include a requirement that the defendant be placed on a term of supervised release after imprisonment. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release.

Section 3583(e)(3) provides that, upon finding a violation of a condition of supervised release, a district court may

> revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release * * * without credit for time previously served on postrelease supervision, * * * except that a defendant whose term is revoked under this paragraph may not be required to serve more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B

3. Petitioner appealed the revocation of his supervised release. He argued on appeal that the court should overrule its decision in *Schrader*, *supra*, and should hold that 18 U.S.C. 3583, as in effect before Congress enacted Section 3583(h) in 1994, did not authorize the district court, upon revoking supervised release, to impose both a term of reimprisonment and a new term of supervised release. The court rejected petitioner's argument to overrule *Schrader*, noting that it has "repeatedly declined to reconsider *Schrader* en banc." Pet. App. A2. The court also rejected petitioner's argument (which depended on the overruling of *Schrader*) that application of new Section 3583(h) to authorize his renewed term of supervised release would violate the Ex Post Facto Clause, U.S. Const. Art. I, § 9, Cl. 3. Pet. App. A2. The court noted that it had "previously considered and rejected such arguments" (*ibid.*) in *United States* v. *St. John*, 92 F.3d 761 (8th Cir. 1996), which held that "the new law and [the Circuit's] interpretation of the prior law have the same effect," *id.* at 766.

**DISCUSSION**

Petitioner urges (Pet. 3-5) this Court to decide whether the Eighth Circuit has correctly interpreted 18 U.S.C. 3583(e) (1988), as it was in effect at the time he committed his underlying drug offense, to authorize the district court, upon revoking his initial supervised release, to impose both a term of reimprisonment and a renewed term of supervised release. Under the Eighth Circuit's construction of Section 3583(e)(3) as in effect at the time of petitioner's underlying offense, "the dis-

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felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case.

trict court could impose, in addition to the term of imprisonment (as limited by the statute), a new term of supervised release, so long as the aggregate of the two terms is less than or equal to the original term of supervised release." *United States* v. *St. John*, 92 F.3d 761, 765 (1996); see *United States* v. *Schrader*, 973 F.2d 623, 625 (8th Cir. 1992). The circuits divided on that question, see note 2, *supra*, and in 1994 Congress enacted 18 U.S.C. 3583(h), which now makes clear that district courts do have the authority to impose a new term of supervised release, as well as a term of reimprisonment, upon revoking an offender's supervised release.

Although the question whether the district courts had authority under Section 3583(e)(3) to impose a renewed term of supervised release before Congress enacted Section 3583(h) is therefore of no general prospective importance, nonetheless this case should be held for the Court's decision in *Johnson* v. *United States*, cert. granted, No. 99-5153 (Oct. 18, 1999). In *Johnson*, the Court granted certiorari to determine whether the Ex Post Facto Clause prevents a district court from exercising its authority under Section 3583(h) to impose a renewed term of supervised release as well as a term of reimprisonment on an offender who committed his underlying offense before Section 3583(h) was enacted, in a circuit that had previously concluded that Section 3583(e)(3) did not authorize the district courts to impose both reimprisonment and renewed supervised release as a sanction for a violation of the conditions of supervised release.

In *Johnson*, the Court may have occasion, in comparing the law before Section 3583(h) was enacted with the law after its enactment, to determine whether district courts had authority to impose a renewed term of

supervised release before enactment of Section 3583(h). That determination may, in turn, affect the court of appeals' conclusion in this case that petitioner's renewed term of supervised release would have been valid under the old law. Accordingly, the petition in this case should be held pending the Court's decision in *Johnson*.

## CONCLUSION

The petition for a writ of certiorari should be held pending the decision of the Court in *Johnson* v. *United States*, cert. granted, No. 99-5153 (Oct. 18, 1999), and then disposed of as appropriate in light of the decision in that case.

Respectfully submitted.

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OCTOBER 1999